

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition to Establish Procedural)	Docket No. WC 07-267
Requirements to Govern Proceedings for)	
Forbearance under Section 20 of the)	Docket No. FCC 07-202
Communications Act of 1934, as Amended)	

**THE COMMENTS OF
THE MEMBERS OF THE MID-ATLANTIC CONFERENCE OF
REGULATORY
UTILITY COMMISSIONERS AND THEIR STATE COMMISSIONS**

The Six member states of the Mid-Atlantic Conference of Regulatory Utility Commissioners (“MACRUC States”)¹ are filing these Comments. The MACRUC States filing these Comments are the Delaware Public Service Commission, the Public Service Commission of the District of Columbia, the New Jersey Board of Public Utilities, the New York Public Service Commission, the Pennsylvania Public Utility Commission, and the Commonwealth of Virginia State Corporation Commission.

The MACRUC States Comments address the Federal Communications Commission’s (“FCC”) Notice of Proposed Rulemaking on Forbearance

¹ Current MACRUC Members are the Delaware Public Service Commission, the Public Service Commission of the District of Columbia, the Kentucky Public Service Commission, the Maryland Public Service Commission, the New Jersey Board Of Public Utilities, the New York Public Service Commission, the Pennsylvania Public

Petitions at WC Docket No. 07-267 and FCC Docket No. 07-202 adopted November 27, 2007, released November 30, 2007 (the Forbearance NPRM). The Federal Register published the Forbearance NPRM on February 6, 2008 beginning at Page 6888.

The FCC requests input on the following issues: (1) the scope and applicability of forbearance under 47 U.S.C. §§ 160 (forbearance) and 332 (Commercial Mobile Radio Services (CMRS) or wireless); (2) the need for procedures to govern forbearance petitions, notice and comment processes; (3) a “complete as filed” requirement similar to Section 271 proceedings; and (4) whether the FCC should specify certain information as necessary to make a *prima facie* showing that forbearance is appropriate. The FCC also seeks comment on: (5) the burden of proof; (6) requirements to document compliance with each component of any forbearance test; (7) the use of protective orders; and (8) procedures involving state commission input.

Finally, the FCC requests input on: (9) the management of timelines under the Section 160 deadline of one year for a decision absent an extension; (10) whether a written order is a requirement for all Section 160 proceedings; and (11) the advisability of applying any process requirements to pending proceedings.

Utility Commission, the Virgin Islands Public Service Commission, the Virginia State Corporations Commission, and the West Virginia Public Service Commission.

The Six MACRUC States Comments are confined to process issues at this time. The MACRUC States do not address the legal interplay of Sections 160 and 332 of the Communications Act of 1934, as amended. The Comments do not address the applicability of the Administrative Procedures Act (APA).

The MACRUC States' suggestions refer to Section 160(c). Section 160(c) establishes a statutory deadline for a forbearance petition which requires the FCC to act within one year after the FCC "receives" a petition or the petition is deemed granted, absent an additional 90 day extension. The MACRUC States recognize that Section 332 does not apparently establish a deadline. The MACRUC States' suggestions recognize that other Comments addressing the federal Administrative Procedures Act (APA) could impact the suggestions put forth in these Comments.

THE COMMENTS OF THE MACRUC STATES

1. *A "Complete as Filed" Requirement.* The MACRUC States suggest an approach in which an applicant seeking forbearance should be expected to file enough information, data, and supporting documentation to establish a *Prima Facie* case on the first filing date. The submission of substantial supplemental data or information should also "reset" the decision

timeline under 47 USCA § 160(c).

The MACRUC States make these recommendations because the federal statute, unlike the statutes in some states, allows parties to submit *Ex Parte* filings after expiration of the federal Comment and Reply Comment period. The MACRUC States' experience has been that even after the states learn of a proceeding, the Petitioners often file exhaustive supplemental data, information, or supporting documentation after expiration of the formal filing period. These substantial supplemental filings should be available for analysis by state commissions in order to facilitate a state commission's determination of whether to participate in a forbearance proceeding.

When *Ex Parte* filings are made very close to the expiration of the pending deadline for a decision under Section 160(c), the state commissions are either unaware of the filing or have little time to file an analysis. This is particularly true for controversial or very complex forbearance proceedings. Substantial supplemental filings often contain valuable and useful information that need to be examined by a state commission if the decision will have an impact in the state in which the state commission has regulatory authority. Importantly, the submission of substantial supplemental data, information, or commitments may alter a state commission's initial position on the proposed forbearance. Consequently, all parties to a forbearance proceeding would benefit from a conclusion that a Petitioner's submission of

additional significant data, information, or supporting documentation after expiration of the formal comment period should be provided to the state commissions. MACRUC States further suggest that the filing date of substantial new information or data effectively “reset” the date for a decision under Section 160(c). The MACRUC States recognize that *errata* filings or a filing that does not contain substantial information should not be subject to this approach.

The MACRUC States make these suggestions because, currently, there is no obligation to provide state commissions with notice of, or information contained in, a Petitioner’s filing at the FCC. This includes the original Petition and any substantial supplemental *Ex Parte* filings. The MACRUC States suggest this approach because it combines an obligation to provide copies of supplemental filings to the state commissions and the resetting of the Section 160(c) deadline when new filings are made. The approach warrants consideration because it gives the FCC, states, Petitioner, and the interested public enough time to make a reasoned and sustained analysis of forbearance.

In the alternative, the FCC could conclude that the Petitioner’s submission of data, information, or commitments after the expiration of the formal comment period warrants outright denial of the earlier Petition. In that case, the FCC could publish notice of the original Petition and the

substantial filing as a New Petition under Section 160.

2. *Information Sufficient to Establish a Prima Facie Case; Burden of Proof; Documentation of Compliance with Forbearance Tests.*

As noted above, the MACRUC States recommend that the FCC require a Petitioner to provide enough data and information to establish a *Prima Facie* case. A *Prima Facie* case is enough data and information to allow the Commission to resolve the three-pronged test for forbearance set out at 47 U.S.C. § 160(a)(1)-(3).

The burden of proof should always be on the Petitioner or proponent of forbearance. Otherwise, a Petitioner could simply make general and vague claims about harm to competition that, without documentation, the interested public might be unable to address without adequate data and information from the Petitioner. By keeping the burden of proof on the Petitioner or proponent of forbearance, the Petitioner or proponent will have the appropriate incentive to provide the data and information needed to determine if forbearance is appropriate.

The Petitioner should be required to provide a copy to the state commissions at the time the Petitioner submits the filing with the FCC.

The MACRUC States see no need for a formal attestation of service requirement. Attestation of Service is a technical legal term of art that could

produce litigation over compliance with service. The resulting litigation at the state or federal level means more time and resources would be devoted to arcane procedural concerns as opposed to the substantive issues.

The MACRUC States caution against suggestions that could raise technical noncompliance issues. By the same token, the obligation to provide a copy of any Petitioner filing to the state commissions at the time the Petitioner files with the FCC effectively ensures that state regulators are aware of the proceeding. A requirement that the petition be hand delivered or deposited with an overnight delivery service would be sufficient.

The MACRUC States make this suggestion based on experience. In the past, Petitioners seeking forbearance often file Petitions and substantial supplemental information, typically in *Ex Parte* filings, without giving a copy to the state commissions.

As a result, the state commissions learn of a proceeding or the *Ex Parte* filing with a very short time for analysis and a determination on the extent of their involvement in any given forbearance proceeding. The press of other obligations and the last minute awareness often can leave the state commissions with little time to determine whether a response is appropriate. An obligation to provide a copy of a petitioner's Petition or supplemental filings on the same day the filing is made at the FCC should assist in alleviating the problem.

In the alternative, the FCC could allow a filing party to submit whatever information deemed appropriate to meet the forbearance test. Following submission of the information, the FCC could conduct a review of the filing and determine if the Petitioner has established a *Prima Facie* showing. If not, the FCC can simply reject the filing for failure to establish the forbearance minimum showing. If the Petition passes FCC review, the FCC could publish the Petition in the Daily Digest and thereby officially “receive” the Petition.

3. *Incomplete Filings.* The MACRUC States recommend that the FCC establish the minimum information a party must file before a Petition is deemed sufficiently complete. A Petition should be deemed complete if the Petition contains data, information, and documented claims addressing each of the forbearance criteria under Section 160(a) or 332(c)(1), respectively.

In those cases where the filing is incomplete, the FCC could simply reject the filing. Upon rejection, the Petitioner could file for reconsideration or appeal of a final decision of the FCC. In the alternative, the FCC could allow the Petitioner to submit another filing with additional information, data, and documentation in support of forbearance. Petitions that require additional information would be “received” for purposes of the one-year period in 47 U.S.C. §160 (c) when the additional information is received. A

Petitioner may find this process more cost-effective in addressing forbearance as opposed to litigating the matter before the FCC in a Reconsideration Petition or with an appeal to the federal court.

4. *Timeline for a Forbearance Decision.* Section 160(c) of the Communications Act of 1934 requires the FCC to make a decision on a forbearance request within one year unless the FCC extends the period for an additional three months. The Section 160(c) timeline is triggered when the FCC “receives” a filing.

The MACRUC States suggest that “receives” mean the period beginning with notice in the Daily Digest or, perhaps, the Federal Register. The MACRUC States proffer this recommendation because in that one-year period the FCC, states, Petitioner, and interested public are required to evaluate complex data involving multiple issues. By expanding the definition what it means to “receive” a filing, the FCC would greatly assist the interested public having enough time to study the information and determine its view or involvement in any given forbearance proceeding.

The MACRUC States recognize that the one-year limitation is conceptually a good idea. In the MACRUC States’ experience, however, new information that supplements an original filing can and often does get filed in a time frame that is substantially removed from the filing date and closer to

the expiration of the decision date.

The abbreviated time period pressures the FCC, the states, and the interested public to complete their evaluation of complex data involving multiple issues. The MACRUC States contend that a timely and orderly consideration of a forbearance request warrants flexibility in determining when the FCC “receives” a filing.

In the alternative, the FCC could adopt a position that substantial supplemental filings after a date certain, perhaps the 90th day following notice in the Daily Digest, constitute an effective “refiling” of the original Petition. Another alternative would be for the FCC to conclude that submission of substantial supplemental filings containing data, information, or considerations supporting forbearance warrants outright rejection of the original Petition. In that case, the FCC could republish the new Petition, consisting of the original Petition and substantial supplemental filings, and establish revised public comment periods.

5. Protective Orders; State Commission Access to Proprietary Information.

The MACRUC States existed prior to the Constitution of 1787 which created the national government. The MACRUC States are co-sovereign states and not private parties.

Some of the MACRUC States also have state processes that do not automatically consider information to be “confidential” or “proprietary” except after a proceeding. Other state commissions treat claims as presumed confidential unless a party challenges the classification.

For these reasons, the MACRUC States caution against an approach which treats the state commissions as private litigants. The MACRUC States suggest that state commissions should not have to execute proprietary non-disclosure agreements, imposed on private parties to prevent competitive harm. The state commissions are not competing with a Petitioner nor are the state commissions a private party that supports or opposes forbearance.

The MACRUC States recognize that structural theory and a Petitioner’s fear of competitive harm must be balanced. In the alternative, the MACRUC States suggest that a brief paragraph agreeing to respect the confidential nature of proprietary information submitted to the Petitioner and the FCC should be sufficient to alleviate any concerns about the state commissions’ roles in forbearance proceedings.²

A state commission should have the option to file a brief paragraph agreeing to treat the information as confidential or proprietary. Where

² Some state commissions treat filed information as public information under their Freedom of Information Acts absent a contrary determination. The FCC’s rules should reflect the need for some states to make that determination before or after they receive the confidential or proprietary information.

necessary and appropriate, a state commission may have to make a preliminary determination on the nature of the information before obtaining that information from a Petitioner.

Consistent with a state's legal treatment of such information, the MACRUC States suggest that the Petitioner should provide the state commission with the proprietary documentation submitted in the Petition or any supplemental filing. A Petitioner would not be expected to provide proprietary documentation in the copy of any Petition provided to the state commission at the time it files the forbearance Petition at the FCC. The Petitioner would be required to provide the proprietary documentation, however, after the state commission either submits the brief paragraph to the FCC or after a determination on the treatment of the information as confidential or proprietary as required by state law.

6. *Procedures for State Commission Input.* The MACRUC States support formal processes for soliciting state input on any forbearance that will have an impact within the state in which the state commission has regulatory authority. The MACRUC States, as explained above, support requiring a Petitioner or proponent of forbearance to provide a copy to the appropriate state commission. The MACRUC States, however, have not addressed to what extent the obligation to provide a copy should be imposed

on all parties in every forbearance proceeding, particularly the opponents or trade association members involved in a forbearance proceeding. The MACRUC States will address this, if necessary, following review of the filed Comments.

The MACRUC States propose a forbearance process that seeks their input as follows:

First, the Petitioner or proponent files a Complete Petition, establishing a *Prima Facie* showing that forbearance is warranted based on data and information addressing the criteria set forth in Section 160(a) or 332(c)(1), as appropriate.

Second, a copy of the Petition is provided to the state commissions. If the Petition filed with the FCC contains proprietary data, the copy provided to the state commissions would not be redacted unless the FCC determines in a rulemaking that a state commission should have to execute a brief statement agreeing to respect the proprietary nature of the filing. Upon execution of the brief statement and after filing the statement with the FCC and the Petitioner, the Petitioner provides the state commission with a complete copy of the entire Petition.

Third, the Petition and FCC determination on the “Completeness” of the Petition are made within 60 days of filing. The FCC’s preliminary determination that the Petition is complete and that the Petitioner has

established a *Prima Facie* showing are posted on the Daily Digest coterminous with establishment of a Comment and Reply Comment period. Publication in the Daily Digest constitutes “receipt” of the filing under Section 160(c) and the one-year decision period begins to run.

Fourth, the Comment and Reply Comment period will expire no more than 90 days after publication in the Daily Digest. During that time, the state commissions analyze the data and information, and may file Comments and Reply Comments on the established dates. Any substantial supplemental filing by a Petitioner or proponent of forbearance following the expiration of the Comment and Reply Comment periods will constitute a New Filing warranting Completeness and *Prima Facie* review, and another Comment and Reply Comment period.

Fifth, if no substantial supplemental filings are made, the state commission could review the information and may file its State Response 30 days after the expiration of the Comment and Reply Comment period. The State Response would be due 120 days after publication in the Daily Digest. The state commission’s Comments, Reply Comments, or State Response should give the state commission legal standing.

Sixth, the Petitioner and any other interested member of the public could file a Reply to the State Response 30 days after the state commission files its State Response. This would be 150 days after publication in the

Daily Digest. There would be no more supplemental filings, Comments, Reply Comments, State Responses, or Replies thereto after the 150th day unless the FCC determines otherwise for good cause shown.

Seventh, any substantial supplemental filing, including those determined to be appropriate by the FCC for good cause showing, will constitute a new Petition. The new Petition will be reviewed for completeness. Following the FCC review, the FCC will publish notice of the new Petition and establish new Comment, Reply Comment, State Response, and Reply deadlines.

Eighth, from day 150 through day 365, the FCC analyzes the data, information, filings, Comments, Reply Comments, State Response, and Reply. At any time from Day 150 through Day 365, the FCC can accept, reject, or take other action deemed appropriate. Any action by the FCC between Day 150 and Day 365 shall be in writing. At any time from Day 150 through Day 365, the FCC can request supplemental information, data, or considerations. Any substantive filing made in response to an FCC request made between Day 150 through Day 365 shall constitute a new Petition. The failure to respond to an FCC request made between Day 150 and Day 365 shall constitute withdrawal of the Petition. Upon that constructive withdrawal, the Petitioner may file another Petition.

Ninth, the FCC may accept, reject, or take other action on the Petition between Day 150 and Day 365. Any action by the FCC between Day 150 and Day 365 shall be in writing. The FCC may, at any time between Day 150 and Day 365, reject a Petition for failure to establish forbearance under Section 160(c) or 332(c)(1), respectively. The FCC may, consistent with Section 160(c), extend the consideration period another 90 days. The FCC can take any action during the Extended Consideration Period that the FCC could take between Day 1 (date of publication in the Daily Digest) and Day 365.

7. *State Commission Authority and Section 160(e).* The MACRUC States are very concerned about the impact of Section 160(e) and independent state law. Section 160(e) prohibits a state commission from applying or enforcing any provision that the Commission has determined to forbear from applying.

The MACRUC States view Section 160(e) as a limitation on the state commission's exercise of federal law. The MACRUC States do not view Section 160(e) as a limitation on independent state law obligations. Section 160(e) does not address preemption or the FCC's authority to overturn independent state law.

For that reason, the MACRUC States consider forbearance to not limit their independent state law unless and until the FCC expressly preempts

state law in a manner consistent with federal preemption. Section 160(e) is not a federal preemption authority separate and apart from any other provision of federal law authorizing the FCC to preempt the states.

The MACRUC States take this position for several important reasons. The MACRUC States note that recent forbearance proceedings before the FCC raise issues like consumer complaints and network investment, to name a few. The MACRUC States also note that some carriers actually secured forbearance from a federal requirement that a carrier designated as an eligible telecommunications carrier for purposes of federal universal service support provide services, at least in part, over its own facilities.

These kinds of forbearance petitions are a far cry from the pro-competitive goals envisioned by the forbearance provisions. These kinds of provisions are actually more in the nature of a waiver request. But, unlike a waiver request seeking a waiver from FCC rules, these kinds of forbearance petitions raise Section 160(e) issues.

The MACRUC States urge the FCC to expressly hold that the forbearance granted under Section 160 does not obviate independent state laws. There is no need to stress the relationship between the FCC and the states by an expansive interpretation of a forbearance Petition to deliver more broadly than a party can obtain with a more narrowly focused waiver request.

The MACRUC State Commissions and individual Commissioners appreciate the opportunity to file these Comments.

On behalf of the Delaware Public Service Commission

/s/ Arnetta McRae

Chair

/s/ Joann T. Conaway

Commissioner

/s/ Jaymes B. Lester

Commissioner

/s/ Dallas Winslow

Commissioner

/s/ Jeffrey J. Clark

Commissioner

For the Public Service Commission of the District of Columbia

/s/ Agnes A. Yates

Chairperson

/s/ Richard E. Morgan

Commissioner

/s/ Betty Ann Kane

Commissioner

On Behalf of the New Jersey Board of Public Utilities:

/s/
JEANNE M. FOX
PRESIDENT

/s/
FREDERICK F. BUTLER
COMMISSIONER

/s/
NICHOLAS ASSELT
COMMISSIONER

/s/
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COMMISSIONER

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ON BEHALF OF THE NEW YORK PUBLIC SERVICE COMMISSION

/s/

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COMMONWEALTH OF PENNSYLVANIA
PUBLIC UTILITY COMMISSION

Docket No.
WC 07-257

Wendell F. Holland, Chairman
Commonwealth of Pennsylvania,
Public Utility Commission

/s/

On behalf of the Commonwealth of Pennsylvania,
Public Utility Commission

/s/ _____
Joseph K. Witmer, Esq.
Assistant Counsel

Dated: March 7, 2008

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

ON BEHALF OF THE VIRGINIA STATE CORPORATION COMMISSION

/s/ Judith Williams Jagdmann
Chair

/s/ Mark C. Christie
Commissioner